ACA INTERNATIONAL
The Association of Credit and Collection Professionals

June 13, 2018

Submitted via electronic filing: http://apps.fcc.gov/ecfs/

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Public Notice concerning the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket No. 18-152 CG; Docket No. 02-278

Dear Ms. Dortch:

ACA International ("ACA") respectfully submits these comments in response to the Public Notice[1] related to the interpretation and implementation of the Telephone Consumer Protection Act ("TCPA") following the recent decision of the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") in *ACA International et. al.* v. *Federal Communications Commission* (*ACA Int'l*).[2]

Enacted nearly 30 years ago in 1991, the TCPA and the Federal Communications Commission's ("FCC" or "Commission") implementing regulations of it, have not kept up with numerous technological developments. Notably, many of these developments since that time such as communicating with consumers on cell phones and sending text messages are no longer even revolutionary. Rather, these communication methods have been widely popular for well over a decade and have proven to be consumers' preferred method of communication.[3] Yet, in recent years the Commission has refused to provide much needed clarifications surrounding TCPA

[1] Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018). ("*ACA Int'l* Public Notice")

[2] *ACA Int'l, et al*. v. *FCC*, 885 F.3d 6(D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-1 Rcd 7961 (2015). ("*ACA Int'l* v. *FCC*")

[3] National Center for Health Statistics. *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June* 2017, available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf. More than one-half of American homes (52.5%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the first half of 2017—an increase of 3.2 percentage points since the first half of 2016. Nearly three-quarters of all adults aged 25-34 were living in wireless-only households; more than two-thirds (70.7%) of adults renting their homes were living in wireless-only households.

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compliance in its interpretations of the statute for highly regulated and legitimate businesses seeking to provide consumers with needed information on their cell phones. Unfortunately, this ambiguity has been a detriment to both consumers and those trying to comply. Instead of addressing outdated and in some cases outright flawed interpretations of the TCPA, the Commission in its 2015 Omnibus TCPA Ruling and Order ("2015 Order") made matters worse.[4] It created such a broad interpretation of what was considered an autodialer that informational communications that very clearly were not even imagined when enacting the statute, such as sending a text message from a smartphone, could have been swept into potential liability. This is notwithstanding that the TCPA was actually developed for the purpose of limiting mass telemarketing calls, not informational calls.[5]

As a result of this action, ACA International filed a lawsuit in the D.C. Circuit challenging several aspects of the Order, which are now at issue in the Public Notice.[6] As the D.C. Circuit stated in their recent opinion concerning the challenge of the 2015 Order, "If every smartphone qualifies as an Automatic Telephone Dialing Systems ("ATDS"), the statute's restrictions on autodialer calls assume an eye-popping sweep."[7]

While the overly broad interpretation of the ATDS has been a major challenge for TCPA compliance, this is only part of the problem. There are also several other flawed interpretations of the TCPA from the 2015 Order[8] as outlined in our comments, and other previous problematic Commission interpretations such as the determination that at least some predictive dialers may be an ATDS. As a result of our lawsuit some of the most egregious aspects of the 2015 Order including the definition of an ATDS and the reassigned number one-call safe harbor were struck down, but in general the operating environment still remains far from certain or workable for businesses and consumers alike throughout the country as discussed *infra*.[9] Accordingly, we appreciate the Commission's quick responsiveness in issuing the Public Notice in response to the D.C. Circuit's findings in *ACA Int'l* and subsequent issue of a mandate, concerning several arbitrary and capricious aspects of the 2015 Order.

Even since the D.C. Circuit's *ACA Int'l* decision in March, we have seen conflicting case law handed down in the collections industry showing not only confusion, but questionable liberties being taken by the judiciary.[10] This judicial advocacy is fortified by the current gap left by the

[4] Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015). ("2015 Order")

[5] The TCPA's restriction on calls to wireless numbers and other mobile devices was not meant to apply where "the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. REP. NO. 102-317, at 17 (1991).

[6] *ACA Int'l* Public Notice, *supra* note 1.

[7] *ACA Int'l* v. *FCC*, *supra* note 2 at 16.

[8] 2015 Order, *supra* Note 4.

[9] *ACA Int'l* v. *FCC*, *supra* note 2.

[10] *See, e.g., Estrellita Reyes* v. *BCA Financial Services, Inc.*, No. 16-24077, (S.D. Fla. May 14, 2018), The district court ruled that the predictive dialer BCA Financial Services used to call the Plaintiff is an ATDS under the TCPA because even though the dialing system/equipment cannot generate random or sequential numbers, it is capable of automatically dialing a phone number without human intervention. In so ruling, the district court held that the FCC's 2003 and 2008 predictive dialer rulings survived the D.C. Circuit Court of Appeals decision in *ACA Int'l v. FCC* and, therefore remain binding law, even if the 2015 TCPA Omnibus Ruling was set aside as inconsistent with those

D.C. Circuit decision in *ACA Int'l*, which set aside the FCC's unreasonably expansive interpretation of what equipment constitutes an ATDS and the rejection of the approach to reassigned numbers and the one-call safe harbor. While the Court set aside the FCC's interpretation of ATDS and the reassigned number approach, the Court did not define ATDS and did not provide a different approach. As a result, the FCC must act to fill these holes and provide much-needed clarity on these issues, as well as other outstanding issues surrounding past TCPA interpretations. Dissents from Chairman Pai and Commissioner O'Rielly also expressed many concerns about the 2015 Order as outlined in our comments.

Litigation stemming from the TCPA continues to be a crippling threat to businesses throughout the country including many small businesses in the collections industries, as well as dozens of financial institutions and other industries throughout the country.[11] As we noted as a co-signatory in a recent U.S. Chamber Institute for Legal Reform led Petition signed by well over a dozen industries ("Chamber Petition"),[12] the amount of TCPA litigation continues to explode. Under one analysis, the number of TCPA lawsuits increased from 2,127 in the 17 months prior to the FCC's 2015 Omnibus Order to 3,121 in the 17 months after the Order.[13]

ACA supports the Commission's recent increased efforts to combat illegal and fraudulent calls that are being made using automatic dialing systems, including its strong and swift enforcement

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earlier rulings; In *Swaney* v. *Regions Bank*, No. 13-00544, 2018 WL 2316452 (N.D.Ala. May 22, 2018) the court ruled that a bank's dialing system is an automatic telephone dialing system under the TCPA because it has the capacity to dial numbers without human intervention. The district court based its decision on the FCC's 2003 Order in which the "FCC concluded that the defining characteristics of an ATDS is 'the capacity to dial numbers without human intervention.'" The district court explained that although the D.C. Circuit Court of Appeals invalidated certain portions of the 2015 FCC Order in *ACA* v. *FCC*, the D.C. Circuit Court's decision did not impact the portion of the 2015 FCC Order that reaffirmed the FCC's 2003 Order related to its ATDS "determination that, 'while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS."; Alternatively, in *Herrick* v. *GoDaddy.com, LLC,* No. CV 16-00254-PHX-DJH, 2018 WL 2229131 (D. Ariz. May 14, 2018) the court granted summary judgment in favor of defendant GoDaddy, finding that GoDaddy did not use an ATDS to send the text in question, because the platform at issue "lacked the capacity to become a device that could randomly or sequentially generate numbers to be dialed." Calling the FCC's ATDS interpretations "defunct," the *Herrick* court fell back on statutory construction. The *Herrick* court pointed out that, owing to *ACA Int'l*, it was not bound by the FCC's 2015 rejection of the "human intervention test," and found of its own accord that "a device will only constitute an ATDS if it can dial numbers (or send text messages) 'without human intervention.'"; In *Maddox* v. *CBE Group, Inc.*, No. 17-1909, 2018 WL 2327037 (N.D.Ga. May 22, 2018) the U.S. District Court for the Northern District of Georgia ruled that The CBE Group, Inc., was not liable under the TCPA for a series of debt collection calls it placed to a consumer because its Manual Clicker Application (MCA), CBE's patent-pending web-based software platform used to dial the consumer's cell phone, does not qualify an automatic telephone dialing system. Citing *ACA, Int'l* v. *FCC*, the district court explained that CBE's MCA is not an ATDS because the dialing system: (1) "requires human intervention to initiate a call", and (2) "does not use any kind of predictive or statistical algorithm to engage in predictive dialing or minimize waiting times."

[11] *See* TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits, U.S. Chamber Institute for Legal Reform (August 2017), available at http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sourcesand-targets-of-recent-tcpa-lawsuits.

[12] U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018). ("Chamber Petition")

[13] *See TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform (August 2017), available at http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sourcesand-targets-of-recent-tcpa-lawsuits.

actions against those harming consumers.[14] A laser focus on enforcing the law against individuals and "businesses" operating outside of the regulatory space is without question the best way to end abusive communications with consumers. Nevertheless, these efforts alone are not enough to provide much needed certainty in the marketplace and create clear rules that distinguish between legitimate communications and bad actors. As the D.C. Circuit highlighted in *ACA Int'l*, the FCC has more work to do to address flaws in the 2015 Order and other past TCPA interpretations. The FCC should act immediately to address our outlined concerns for the protection of both consumers, who need to understand their rights, as well as businesses such as those in the collections industry that remain vulnerable to predatory litigation based on impracticable and unclear requirements.

We urge the FCC to take the following actions:

- Provide an appropriately tailored interpretation of what is considered to be an ATDS, with the pertinent clarification that not all predictive dialers are an ATDS;
- Clarify that "capacity" under the TCPA means present ability and explain that when human intervention is required for a call, the call is not made using an ATDS;
- Provide a safe harbor for reassigned numbers that better aligns with its statutory directive and address key questions about what is considered a "called party" including interpreting it is an "intended recipient";
- Provide better parameters for how a consumer can revoke consent, which gives both consumers and businesses flexibility but also more certainty about what is considered "reasonable" including methods outlined in contractual agreements; and
- Reexamine the Commission interpretation of the Bipartisan Budget Act of 2015, which was intended to exempt calls "made solely to collect a debt owed to or guaranteed by the United States" from the prior express consent requirement of the TCPA. The Commission's interpretation conversely created new burdens and confusion for attempting to collect this kind of debt.

I. BACKGROUND ON ACA INTERNATIONAL

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, ACA represents approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to a recent survey, 44 percent of ACA member organizations (831 companies) have fewer than nine employees. Additionally, 85 percent of members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees.[15]

[14] FCC, *FCC Fines Massive Neighbor Spoofing Robocall Operation $120 Million* (May 10, 2018), available at https://www.fcc.gov/document/fcc-fines-massive-neighbor-spoofing-robocall-operation-120-million.
[15] Josh Adams, *Small Businesses in the Collections Industry 2018*, ACA International White Paper (May 2018), available at https://www.acainternational.org/assets/research-statistics/aca-wp-smallbusiness-5-18.pdf.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for goods and services consumers already received. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

The credit and collections industry is a highly regulated industry complying with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. The collection activities of ACA members are regulated by the Bureau of Consumer Financial Protection, ("BCFP") which supervises and examines Large Market Participants in the industry, and has rulewriting and enforcement authority for the Fair Debt Collection Practices Act ("FDCPA"). Additionally, the collections industry is also subject to the Federal Trade Commission Act, the Fair Credit Reporting Act, and the Gramm-Leach-Bliley Act, in addition to a myriad of other federal and state laws. It is also worth observing that the BCFP has indicated in its most recent rulemaking agenda that it plans to propose news rules for the FDCPA in March of 2019. This means other federal agencies are already taking consumer protection measures, which allows the FCC to focus more narrowly on its statutory directive for telecommunications under the TCPA.[16]

ACA members contact consumers exclusively for non-telemarketing reasons to facilitate the recovery of payment for services that have already been rendered, goods that have already been received, or loans that have already been provided. The use of modern technology is critical for the ability to contact consumers in a timely and efficient matter, and often the sooner and earlier in the collections process that a consumer is put on notice of a debt, the better off they are. By making these clarifications and necessary updates to TCPA interpretations, the Commission will be serving both consumers and businesses by not unnecessarily impeding the flow of needed information.

II. Comments of ACA International

A. The Definition of Autodialer Needs to be Clarified

1. Capacity Should be Defined as Present Ability

The TCPA defines an automatic telephone dialing system as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[17] The Public Notice notes that in the 2015 Order the Commission had interpreted the term "capacity" to include a device "even if, for

[16] Bureau of Consumer Financial Protection, Spring 2018 Rulemaking Agenda (May 10, 2018), available at https://www.consumerfinance.gov/about-us/blog/spring-2018-rulemaking-agenda/.
[17] 47 U.S.C. § 227(a)(1) (emphasis added).

example, it requires the addition of software to actually perform the functions described in the definition"—"an expansive interpretation of 'capacity' having the apparent effect of embracing any and all smartphones."[18] As the Public Notice acknowledges, the D.C. Circuit set aside this overly expansive interpretation, finding that the Commission's approach to defining an ATDS and the reassigned numbers one-call safe harbor could not be sustained.[19]

It is obvious from the D.C. Circuit's ruling in *ACA Int'l* that the 2015 Order included faulty reasoning that must be addressed, and the FCC correctly is looking for feedback on the question, "If equipment cannot itself dial random or sequential numbers, can that equipment be an automatic telephone dialing system?"[20] The answer is no. As ACA and other Petitioners recently discussed in the Chamber Petition, the Commission must confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers *without human intervention.* This straightforward interpretation flows from the functions of an ATDS outlined in the TCPA. In his dissent to the 2015 Order, Chairman Pai specifically addressed the confusion around what can be considered an autodialer stating,[21]

> The Order's expansive reading of the term 'capacity' transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated, random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices. Think about it. It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So, under the Order's reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a 'rotary-dial phone'—is an automatic telephone dialing system.

We agree with his concerns and so did the D.C. Circuit. When human intervention is required to generate the list of numbers to call or to actually initiate the call, it is not an ATDS. Furthermore, a predetermined list created by a human that is then imported into a calling system, should not qualify as an ATDS. We urge the Commission to provide much needed further clarity on these points.

It is also critical that the FCC rectify past problematic interpretations that incorrectly looked to potential capacity, rather than present capacity. The Commission should issue an interpretation that acknowledges that ATDS functions must actually, not theoretically, be present and active in a device at the time the call is made. The Commission should find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. The D.C. Circuit in *ACA Int'l* noted that the FCC's expansive interpretation of ATDS could be addressed by reinterpreting the statutory phrase "make any call ... using [an ATDS]," to mean that a device's ATDS capabilities must actually be used to place a call for TCPA's restrictions to attach.

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[18] *ACA Int'l* Public Notice, *supra* note 1 at 1.
[19] *Id.*
[20] ACA Int'l Public Notice, *supra* note 1 at 2.
[21] Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015), Dissenting Statement of Commissioner Ajit Pai. ("Pai 2015 Order Dissent")

Commissioner O'Rielly also highlighted this issue in his dissent to the 2015 Order stating,[22]

> I don't think we should start with a presumption that companies are intentionally breaking the law. But it seems that this could be handled as an evidentiary matter. If a company can provide evidence that the equipment was not functioning as an autodialer at the time a call was made, then that should end the matter. For example, a company could show that the equipment was not configured as an autodialer, that any autodialer components were independent or physically separate, that use as an autodialer would require a separate log in, or that the equipment was not otherwise used in an autodialer mode.

We urge the FCC to clarify this issue to ensure that when callers are not using ATDS functions, they should not be subject to TCPA requirements. Finding that "capacity" must mean "present ability" is consistent with the TCPA's plain language, the Commission's rulemakings prior to the 2015 Order, and the everyday meaning of the term and the legislative history of the statute.

2. Not All Predictive Dialers are an ATDS

A predictive dialer can fall within the statutory meaning of an ATDS. However, many predictive dialers are not an ATDS.[23] As ACA outlined in detail in our previous TCPA Petition in 2014, we take issue with several previous FCC's rulings on this point.[24] It is critical that the Commission confirm that simply because a predictive dialer can be an ATDS for purposes of the TCPA, this does not mean that a predictive dialer *is* an ATDS under the TCPA. Pursuant to the statute, to be an ATDS under the TCPA equipment must have the listed elements. A predictive dialer that does not contain those statutory elements by definition is not an ATDS under the statute.

The Public Notice notes that the statute prohibits, "mak[ing] any call . . . using any automatic telephone dialing system"—leading to the question "does the bar against 'making any call using' an [automatic telephone dialing system] apply only to calls made using the equipment's [automatic telephone dialing system] functionality?"[25] The Public Notice then asks if a caller does not use equipment as an automatic telephone dialing system, does the statutory prohibition apply?[26]

We strongly argue that it should not. Specifically, the FCC should clarify that if a predictive dialer does not contain the statutory elements of an ATDS, then it is not an ATDS.

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[22] Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015), Dissenting Statement of Commissioner Michael O'Rielly, 2015 TCPA Order. ("O'Rielly 2015 Order Dissent")

[23] *ACA Int'l* v. *FCC*, *supra* note 2 at 27. The D.C. Circuit recognized, "at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers."

[24] ACA International, Petition for Rulemaking of ACA International, CG Docket No. 02-278 (filed Jan. 31, 2014).

[25] *ACA Int'l* Public Notice, *supra* note 1 at 3.

[26] *Id.* at 3.

Clarifying this definition and rejecting earlier expansions that sweep all predictive dialers into the category of an ATDS is critical to restoring Congress' intent for what constitutes an ATDS.[27]

B. The D.C. Circuit Decision has given the FCC the Ability to Provide a Safe Harbor for Reassigned Numbers that Better Aligns with its Statutory Directive

1. A Reassigned Numbers Database Could be Beneficial if it Provides a Safe Harbor

A reassigned numbers database is not the most pressing, or only, solution to solving the many problems associated with illegal robocallers and the lack of clarity surrounding TCPA compliance. However, there could be benefits to using one centralized database if it is developed thoughtfully. Most importantly, the FCC needs to determine how using the database can provide a much needed safe harbor from excessive TCPA related litigation and how it can operate efficiently without passing on significant costs to small businesses. ACA filed comments outlining our views on a reassigned number database on June, 5, which we urge the Commission to consider in its analysis here.[28]

2. "Called-Party" Should be Interpreted as Intended Recipient

The TCPA and the FCC's rules generally, other than in regards to certain exemptions, require a caller to obtain the prior express consent of the called party when: (1) making a non-emergency telemarketing call using an artificial or prerecorded voice to residential telephone lines; and (2) making any non-emergency call using an automatic telephone dialing system (autodialer), or an artificial or prerecorded voice, to a wireless telephone number, among other specified recipients.[29] In the 2015 Order, the FCC determined that the term "called party" refers not to "the intended recipient of a call" but instead to "the current subscriber" (*i.e.*, the current, nonconsenting holder of a reassigned number rather than a consenting party who previously held the number).[30] The D.C. Circuit found that the Commission was not compelled to interpret "called party" in § 227(b)(1)(A) to mean the "intended recipient".[31] However, it left room for further FCC interpretations in this area, which could allow it to do so.

In the Public Notice, the FCC seeks comment on the following questions, how to interpret the term "called party" for calls to reassigned numbers. Does the "called party" refer to "the person the caller expected to reach"? Or does it refer to the party the caller reasonably expected to reach? Or does it refer to "the person actually reached, the wireless number's present-day subscriber after reassignment"? Or does it refer to a "'customary user' ('such as a close relative on a subscriber's family calling plan'), rather than . . . the subscriber herself"?[32]

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[27] *See* Chamber Petition, *supra* note 10.
[28] *See* ACA International Comments Second Further Notice of Proposed Rulemaking, available at https://www.acainternational.org/assets/aca-to-fcc-focus-on-onerous-tcpa-interpretations-before-reassigned-numbers-database/aca-international---second-fnprm-reassigned-numbers.pdf (June 5, 2018).
[29] 47 U.S.C. § 227(b)(1)(A).
[30] *ACA Int'l* v. *FCC*, *supra* note 2 at 5.
[31] *Id.* at 6.
[32] *ACA Int'l* Public Notice, *supra* note 1 at 3.

We urge the Commission to interpret called party as the party that the caller reasonably expected to reach as the intended recipient. In his dissent to the 2105 Order, Chairman Pai previously supported this approach stating, "Perhaps more to the point, the statute takes into account a caller's knowledge. Recall that the statute exempts calls "made with the prior express consent of the called party." Interpreting the term "called party" to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute."[33] Additionally, Commissioner O'Rielly similarly supported this approach in his dissent stating, "This commonsense approach would have allowed a company to reasonably rely on consent obtained for a particular number. Otherwise, [i]f consent is lost through events about which the caller is totally unaware and has no control, every call carries a $500 price tag and the consent exception becomes illusory, contrary to the intent of Congress."[34] We agree with this analysis and also previously supported this approach in comments ACA filed in support of a Petition for Expedited Declaratory Ruling of the Consumer Bankers Association.[35]

This makes the most sense to be able to have reasonable reliance on the prior express consent given for the intended recipient a collector is calling. Otherwise callers could be unfairly penalized if they make contact with a consumer after taking precautions such as scrubbing a list or using a database that is not reliable. While the collections industry takes all necessary precautions not to call reassigned numbers, in some instances errors are unavoidable even when extraordinary compliance measures are taken. It is clear that this is a situation Congress would intend an affirmative defense to be appropriate for, and while the 2015 Order missed that mark, the FCC has the opportunity now to amend past flawed analysis and create safe harbors and definitions that protect both consumers and those seeking to follow the law. It should also as outlined in ACA's previous comments consider providing a safe harbor for callers that check a reassigned number database or other approved lists.

C. More Certainty is Needed for How Consumers Can Revoke Consent

The Public Notice also seeks comment on how a called party may revoke prior express consent to receive calls. Uncertainty remains about how consumers can revoke consent, since it is broadly defined as able to be done using *any* reasonable means. This has created a lot of concern for the collections and other industries, since arguably "any reasonable means" could include an overly broad range of techniques to revoke consent. Some of these approaches to revoking consent have without question been created for the sole-purpose of bringing TCPA related litigation as described *infra*.[36]

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[33] Pai 2015 Order Dissent, *supra* note 21.

[34] O'Rielly 2015 Order Dissent, *supra* note 22.

[35] *See* Comments of ACA International Supporting the Petition for Expedited Declaratory Ruling of the Consumer Bankers Association (December 1, 2014), available at https://www.acainternational.org/assets/tcparegulatoryadvocacy/111714aca-comments-cbapetition.pdf.

[36] *Epps v. Earth Fare, Inc.*, No. 16-08221, 2017 WL 1424637 (C.D.Cal. Feb. 27, 2017). The U.S. District Court for the Central District of California found, as a matter of law, that the plaintiff's alleged revocation of consent to receive text messages from the defendant was not "reasonable." Despite being prompted to text "STOP" if she wished to revoke her consent, the plaintiff responded instead with long sentences such as "I would appreciate [it] if we discontinue any further texts" or "Thank you but I would like the text messages to stop can we make this happen." Noting that this was one of several similar suits filed by the same plaintiff, the defendant moved to dismiss and argued that her responses had been deliberately designed to frustrate its automated system for recognizing revocations of consent.

The Commission is seeking comment on what opt-out methods would be sufficiently clearly defined and easy to use such that "any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable."[37]

While ACA does not have one specific approach that it believes is the only way a consumer can revoke consent, we think the FCC needs to put more parameters around what it considers to be reasonable. There needs to be enough flexibility so that both parties can have a free flow of communication about the desire to opt-out, but narrow enough that opportunistic plaintiffs' law firms cannot take advantage of a specific opt-out avenue.

One possibility for creating more clarity in this area is to promote the ability of businesses and consumers to enter into a contract, which stipulates the method for revoking consent. In the Second Circuit, the federal appellate court of appeals held that the TCPA does not permit a consumer to revoke his or her consent to receive automated or prerecorded cell phone calls if the previously given consent to receive such calls is part of binding contract. The Second Circuit Court of Appeals found that, "the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted by telephone."[38] Consumers should not to be able to engage in "gotcha" methods of revoking consent when they are engaged in a bargained-for relationship and receiving contracted for goods or services. Accordingly, the FCC should support efforts to allow for contracted methods for revoking consent, which provide transparency to both consumers and the businesses they are seeking goods and services from.

D. Congress Clearly Exempted Calls to Collect Debts Owed to or Guaranteed by the Federal Government, and FCC Must Provide Rules that Comport with this Directive

Congress created an exemption in the Bipartisan Budget Act of 2015 ("Budget Act") that exempts calls "made solely to collect a debt owed to or guaranteed by the United States" from the prior express consent requirement of the TCPA.[39] However, the FCC previously took an extremely narrow reading of this exemption, which deviates significantly from the intent of Congress and the purpose of the exemption.[40] ACA previously filed comments outlining a number of our concerns with the FCC's interpretation of the Budget Act, which we urge the Commission to further consider.[41] In general, we believe the exemption has so many limitations and confusing requirements that it fails to achieve the main objective of the law, and in actuality flies in the face of the Congressional directive to facilitate the collection of debts owed to the government.

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[37] *ACA Int'l* Public Notice, *supra* note 1 at 4.
[38] *Reyes v. Lincoln Automotive Financial Services*, No. 16-2104, 2017 WL 2675363 (2nd Cir. June 22, 2017).
[39] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584.
[40] *Id.*
[41] ACA Comments NPRM Bipartisan Budget Act of 2015 (June 6, 2016), available at https://www.acainternational.org/assets/tcparegulatoryadvocacy/comments-acainternational-tcpanprm-6-6-16-final.pdf.

Specifically, we believe the three-call limit for the exemption is very problematic, and as the Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance ("Great Lakes Petition") describes, seems to be "drawn from thin air".[42] We also have concerns with other aspects of the interpretation such as the one-call safe harbor, which is now even more certainly inappropriate in light of the *ACA Int'l* D.C. Circuit decision.

As a larger matter, the FCC should also reconsider how it interpreted the Budget Act amendments to give it broad authority to regulate federal debt collection calls. The overly expansive interpretation has cut against the purpose of the 2015 Budget Act. We agree with concerns voiced in the Great Lakes Petition that state,[43]

> The FCC treats the amendments as a "blank check" to regulate federal debt collection calls to wireless numbers, including calls placed by entities that are not subject to the TCPA and calls that do not rely on the exemption. This is entirely impermissible given that the legislation seeks to make it easier to place such calls. The new rules also go far beyond any reasonable interpretation of Congress's allowance that the FCC may adopt limits on the "number and duration" of calls.

We also urge the FCC to confirm that government contractors are exempt from the TCPA when they act on behalf of the government. Commissioner O'Rielly even pointed out that the Commission's rules were so disconnected from the intent of Congress that federal government debt collection calls would be subject to more restrictions than other types of calls stating,

> … it is beyond disappointing that the order decides that the federal government and its contractors will face more restrictions when making calls to collect debts than for any other type of call they make. That's the exact opposite of what the Budget Act exemption was designed to accomplish. Clearly, no good law goes unabused in this Commission.[44]

As ACA previously outlined to the Commission, we agree with the Great Lake Petitioners that the Commission's rules to implement Section 301 of the Bipartisan Budget Act of 2015 are contrary to congressional intent, unsupported by the plain language of the statute, and disconnected from the clear record in the proceeding.[45] For these reasons, ACA respectfully reiterates are call to the Commission to reconsider the rules and revise them accordingly.

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[42] Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance of the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, (Dec. 16, 2016).

[43] *Id.*

[44] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CG Docket No. 02-278 (Aug. 11, 2016), Dissent of Commissioner O'Rielly.

[45] Reply Comments of ACA International to Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance (February 13, 2016), available at https://www.acainternational.org/assets/tcpa-regulatory-advocacy/tcpa-pet-for-recon-2-13-17-final.pdf.

E. Conclusion

The D.C. Circuit indicted in its recent decision in response to our legal challenge of the 2015 Order that more clarity is needed about how legitimate businesses such as the collection industry should comply with FCC TCPA interpretations. The Public Notice addresses a number of highly critical issues surrounding past Commission TCPA interpretations raised by the D.C. Circuit and other courts, as well as other issues raised by dozens of businesses throughout the country. We appreciate that the Commission appears to recognize many of the problems stemming from TCPA interpretations from both past FCC leadership and courts, and its attentiveness in seeking feedback on these matters. Important communications with consumers on their cell phones continue to be stymied everyday as a result of the current lack of clarity for rules, and highly regulated legal businesses continue to be overwhelmed, and in some instances eliminated because of the legal risk associated with the TCPA. Therefore, we urge the Commission to act immediately for the protection of all seeking to navigate the rules for contacting consumers on cell phones in the marketplace. While we urge the Commission to consider all of our comments, we again urge it to take the following actions that are most needed immediately.

- Provide an appropriately tailored interpretation of what is considered to be an ATDS, with the pertinent clarifications that not all predictive dialers are an ATDS;
- Clarify that "capacity" under the TCPA means present ability and explain that when human intervention is required for a call, the call is not made using an ATDS;
- Provide a safe harbor for reassigned numbers that better aligns with its statutory directive and address key questions about what is considered a "called party" including interpreting it is an "intended recipient";
- Provide better parameters for how a consumer can revoke consent, which gives both consumers and businesses flexibility but also more certainty about what is considered "reasonable" including methods outlined in contractual agreements; and
- Reexamine the Commission interpretation of the Bipartisan Budget Act of 2015, which was intended to exempt calls "made solely to collect a debt owed to or guaranteed by the United States" from the prior express consent requirement of the TCPA. The Commission's interpretation conversely created new burdens and confusion for attempting to collect this kind of debt.

Thank you for the opportunity to comment. Please feel free to contact me with any additional questions.

Respectfully submitted,

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